Supreme Court, U. S.
FILED
SEP 15 1977
MICHAEL RODAK, JR., CLERK

in the

Supreme Court

of the

United States

OCTOBER TERM, 1977

No. 77-416

JOSEPH MICHAEL GARDNER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GEORGE D. GOLD, ESQ., and
MORAN & GOLD, P.A.
950 Building
950 South Miami Avenue
Miami, Florida 33130
Telephone: (305) 373-5475

Attorneys for Petitioner

INDEX TO PETITION

	Page
CITATIONS TO OPINION BELOW	2
JURISDICTION	3
QUESTIONS PRESENTED FOR REVIEW	4
CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED	6
STATEMENT OF THE CASE	8
REASONS RELIED UPON FOR GRANTING THE WRIT	11
CONCLUSION	25
CERTIFICATE OF SERVICE	26

TABLE OF AUTHORITIES

Cases **Page**

Cardwell v. Lewis,
417 U.S. 583, 94 S.Ct. 2464, L.Ed.2d 325 (1974) 14

Culombe v. Connecticut,
367 U.S. 568, 81 S.Ct. 1860 (1961) 20

McDonald v. United States,
335 U.S. 451, 69 S.Ct. 191 (1948) 11, 12, 13, 14, 18

Miller v. United States,
357 U.S. 301, 78 S.Ct. 1190 (1958) 24

Schneckloth v. Bustamonte,
412 U.S. 218, 93 S.Ct. 2041 (1973) 16, 20

United States v. Brown,
557 F.2d 541 (6th Cir. 1977) 20

United States v. Calhoun,
542 F.2d 1094 (9th Cir. 1976) 20

United States v. Jeffers,
342 U.S. 48, 72 S.Ct. 93 (1951) 23, 24

United States v. Roselli,
506 F.2d 627 (7th Cir. 1974) 17, 19

Vale v. Louisiana,
399 U.S. 30, 90 S.Ct. 1969 (1970) 11

TABLE OF AUTHORITIES (Cont.)

Cases **Page**

UNITED STATES CONSTITUTION

Fourth Amendment 6

Fifth Amendment 6

UNITED STATES CODE

18 U.S.C. Section 3109 6

28 U.S.C. Section 1254(1) 3

OTHER AUTHORITY

Rules of the Supreme Court of the United States
Rule 19(1)(b) 3

in the

Supreme Court

of the

United States

OCTOBER TERM 1977

No. _____

JOSEPH MICHAEL GARDNER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, JOSEPH MICHAEL GARDNER, prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this matter on June 10, 1977. Petition for Rehearing and Rehearing *En Banc* was denied on August 16, 1977.

CITATIONS TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is presently unreported, but does appear in the Appendix hereto (App. A, pp. 1-9). The order denying rehearing and rehearing *en banc* is presently unreported, but is also included in the Appendix hereto (App. B, pp. 10-11). The Fifth Circuit also granted Petitioner's Motion for Stay of Mandate and that order also appears in the Appendix (App. C, pp. 12-13).

JURISDICTION

The judgment, decision and opinion of the United States Court of appeals for the Fifth Circuit sought to be reviewed was entered on June 10, 1977 (App. A, pp. 1-9). The date of the order denying rehearing is August 16, 1977 (App. B, p. 10).

The jurisdiction of this Court is invoked under Title 28, U.S.C. Section 1254(1), and under Rule 19(1)(b). Petitioner believes (i) that the Court of Appeals for the Fifth Circuit has decided a federal question in a way which conflicts with applicable decisions of this Court; (ii) that the Court of Appeals for the Fifth Circuit has rendered a decision essentially in conflict with decisions of the Courts of Appeal for the Sixth, Seventh and Ninth Circuit on the same subject matter; and (iii) that the Court of Appeals for the Fifth Circuit has decided an important aspect of the federal law on whose burden it is to establish compliance with 18 U.S.C. §3109 which has not been, but should be, settled by this court.

QUESTIONS PRESENTED FOR REVIEW

A.

Does *Vale v. Louisiana*, 1970, 399 U.S. 30, preclude a finding of "exigent circumstances" where a Defendant is arrested outside his home and the police have merely been apprised that "someone" is still inside but are not otherwise informed of the identity or complicity of the individual remaining, that person's knowledge of the whereabouts of drugs believed to be inside or any objective facts indicating the imminent destruction of the contraband believed to be within?

B.

Where a Drug Enforcement Agent testifies that he and his fellow agents knew "for sure" that a quantity of cocaine was in the Defendant's home hours before they arrived, is their failure to secure a search warrant a violation of the Fourth Amendment to the *United States Constitution* or may such failure be excused under the principles enunciated in *Cardwell v. Lewis*, 1974, 417 U.S. 583?

C.

Does a Defendant have the burden of proving drug agents' failure to announce their purpose and authority under §18 U.S.C. §3109, and, if so, has a Defendant adequately discharged that burden where defense counsel elicited, on cross, from an agent who heard and observed a fellow agent

knock on the door, that he did not hear any announcement of authority or purpose?

D.

Does absence of proof of direct threats to a Defendant's body preclude a finding of involuntariness of the Defendant's confession where the Defendant was threatened with destruction of his home, harm to his wife and to his pets?

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

United States Constitution, Amendment Four:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

United States Constitution, Amendment Five:

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; ***

Title 18, *United States Code*, Section 3109:

§3109. Breaking doors or windows for entry or exit

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

Rules of the Supreme Court of the United States, Revised, and as amended to November 15, 1975:

Rule 19(1)(b):

Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

STATEMENT OF THE CASE

A Drug Enforcement Administration (D.E.A.) informant and D.E.A. Agent Brown flew down to the Fort Lauderdale International Airport on July 2, 1975, from Atlanta, after the informant (Gunn) had spoken long distance to Petitioner respecting a purchase of cocaine.[1] Gunn and Agent Brown met with agents of the D.E.A.'s Miami Regional Office to outline why they had flown down.

The next day, July 3, 1975, Gunn placed a second call from his motel room to Petitioner at his home, and they made arrangements for Gunn to take delivery of one kilo of cocaine. Agent Brown testified that they knew "for sure" that the cocaine was in Petitioner's house even before Gunn left the hotel to meet Petitioner at a local lounge from which Petitioner would drive Gunn back to his house.

Indeed, hours later, Gunn met Petitioner at the El Toro Lounge and then they departed in Petitioner's car for his home. Although surveilling agents lost sight of the car, other agents were already in position all around Petitioner's house even before the El Toro meeting, and were, of course, watching as they arrived.

The two went inside Petitioner's house and then came back out about twenty (20) minutes later. Just before Gunn entered Petitioner's car, he gave a pre-arranged signal. Upon observing it, the agents descended on foot and in cars from all sides, firearms drawn, and arrested Petitioner and feigned the arrest of Gunn.

[1]Gunn, the informant, had purchased cocaine previously from Petitioner's wife back in April, 1975.

Off to the side, Gunn told the agents *only* that "someone" was still inside the house and that he had seen the cocaine. Notwithstanding the presence at court of almost all of the agents who participated in the arrest, the Government called only Agent Brown. Brown confirmed on direct examination, cross and redirect that Gunn merely had made reference to someone else still inside the house. Gunn did not further elaborate.

After talking with Gunn, and after advising Petitioner of his rights, the agents walked up to the front door and knocked. Agent Brown testified that he was right at the front door when he saw and heard another agent knock. Neither this agent, however, nor any other agent, announced who they were or what their purpose was in seeking entry. They then unlocked the front door with Petitioner's keys (which they had seized) and entered.

Once inside, they found Petitioner's wife out on the sun porch and otherwise secured the premises. Petitioner testified without contradiction that, once inside, the agents threw him (handcuffed) to the floor, kept he and his wife in the living room at gunpoint, threatened to shoot his dogs and to tear the house apart if he did not tell them where the cocaine was. Getting no repsonse from Petitioner, he was segregated from his wife and taken out to the sun porch. Agent Brown recalled how Petitioner was led away so another agent could "talk[ ] to him for a few minutes." He heard bits and pieces of the "talk." One time he heard the other agent say, "We know there is a large quantity in here and we can get a search warrant." Another time he heard Petitioner say, "No, I don't want you tearing up my house."

Petitioner testified that he was so scared and frightened by what the agents had done to him and threatened to do to his dogs and house that he capitulated, and told them where the cocaine was hidden.

REASONS RELIED UPON FOR GRANTING THE WRIT

I.

THE FIFTH CIRCUIT'S DECISION RESPECTING (1) WHAT CONSTITUTES A SHOWING OF EXIGENT CIRCUMSTANCES SUFFICIENT TO DISPENSE WITH THE REQUIREMENT OF A SEARCH WARRANT AND (2) WHAT CONSTITUTES A SHOWING OF COERCION SUFFICIENT TO ESTABLISH THE INVOLUNTARINESS OF A CONFESSION CONFLICTS WITH PRIOR DECISIONS OF THIS COURT ON THE SAME SUBJECTS.

(1) What constitutes a showing of exigent circumstances sufficient to dispense with the requirement of a search warrant?

The decision below constitutes a clear departure from this Court's decisions in *Vale v. Louisiana*, 399 U.S. 30, 90 S.Ct. 1969 (1970) and *McDonald v. United States*, 335 U.S. 451, 69 S.Ct. 191 (1948).

In *Vale v. Louisiana, supra*, the Court rejected as inadequate to pass constitutional muster a showing of "exigent circumstances" based on police officers' generalized fears that someone inside a house (outside of which another occupant of the house has just been arrested) might destroy the narcotics believed to be within. The Fifth Circuit's opinion on this issue is quite close to the Louisiana Supreme Court's opinion which this Court summarized as follows:

> "The Louisiana Supreme Court thought the search independently supportable because it involved narcotics, which are easily removed, hidden, or destroyed. It would be unreasonable, the Louisiana Court concluded, 'to require the officers under the facts of the case to first secure a search warrant before searching the premises, as time is of the essence inasmuch as the officers never know whether there is anyone on the premises to be searched who could very easily destroy the evidence.' " 399 U.S., at 34; 90 S.Ct., at 1972.

The Fifth Circuit engaged in virtually the same speculation as that quoted above. This Court has simply held that fear that "someone" inside might destroy the narcotics is not enough to dispense with the warrant requirement. Rather, there has to be *a showing* that the goods sought to be seized are "in the process of destruction." *Vale v. Louisiana*, 399 U.S., at 35; 90 S.Ct., at 1972. While the underlying meaning of that phrase must surely permit, for example, a showing of *facts* leading a reasonably prudent man to believe that the goods are "in the process of destruction," rather than requiring proof of actual knowledge that they *are being* destroyed, the Fifth Circuit's opinion virtually dispenses with the whole requirement. It so dilutes the standard that there need not even be a presentation of *facts* from which it could be inferred that someone was destroying the cocaine. Intending no disparagement to the panel who decided this case, sophistry now suffices.

The record shows that Gunn (who, we concede, did know Petitioner's wife) did *not* say "Mrs. Gardner is inside." Nor did he report that she was present when *he* saw the cocaine. The only reasonable inference to be drawn

from Agent Brown's repeated insistence that Gunn merely said "someone" was still inside is that he was not referring to someone he knew or to someone he would reasonably have otherwise identified.

The significance of this whole issue really goes far beyond the facts of this case. Historically, police officers' actions are judged by what they knew (or did not know) before seizure *and the showing made on the record in the trial court.* The lower court's opinion says, in effect, "well, regardless of the inadequacy of the showing made, regardless of the fact that the police had *no factual basis for believing either* that an accomplice was inside *or* that the person inside even knew where the cocaine was, we'll indulge official conjecture." Apparently, then, it really is not necessary for the Government to establish, by objective proof, the so-called "jealously guarded exceptions to the warrant requirement."

In *McDonald v. United States*, supra, the Court scored the Government's failure to ventilate "all the circumstances bearing upon the *necessity* to make this search without a warrant . . . ." 335 U.S., at 455; 69 S.Ct., at 193. Petitioner does not now refer so much to the Government's failure to obtain a warrant as much as to its *failure to establish* why it did not obtain one much earlier in the day, right after Gunn's telephone call to Petitioner permitted Agent Brown to state that at that point they knew "for sure" that the cocaine was in the house. The record below literally fails to explain why no such effort was made. Instead, the Government argued dehors the record why it was impractical. The Fifth Circuit has too easily dispensed with the necessity of the Government making the type of showing which this Court has always *required* the Government make before sustaining a warrantless search:

"Where, as here, officers are not responding to an emergency, there must be compelling reasons to justify the absence of a search warrant. A search without a warrant demands exceptional circumstances . . . . *** *[A]ll the circumstances bearing upon the necessity to make this search without a warrant are absent from this record.****

* * *

*** We cannot be true to that constitutional requirement and excuse the absence of a search warrant *without a showing by those who seek exemption* from the constitutional mandate that the exigencies of the situation made that course imperative." *McDonald v. United States*, 335 U.S., at 454, 455; 69 S.Ct., at 193.

While Petitioner believes that the record actually supports a finding that the agents had adequate time to apply for and obtain a warrant (given probable cause to believe the cocaine was in Petitioner's house), the Government wholly failed to make the opposite showing that it was impractical to obtain one. Further underscoring Petitioner's suggestion that the Fifth Circuit has truly relaxed the requirement that agents make a "showing" adequate to dispense with the warrant requirement, the Court is invited to consider that the opinion appears to bottom its approval of the agents' warrantless entry (and the lack of an adequate record) on *Cardwell v. Lewis*, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974), an automobile case. The reasons for relaxing the warrant requirement in auto cases should not have much bearing on cases involving houses.

(2) What constitutes a showing of coercion sufficient to establish the involuntariness of a confession?

Contrary to the Fifth Circuit's opinion that "[b]oth parties agree . . . that the defendant, upon being told a warrant could be obtained to allow a thorough search, correctly informed the agents that cocaine could be found in a kitchen cabinet," *United States v. Gardner*, ____F.2d____, slip opinion page 3680, Petitioner *never* made such a concession in the trial court or on appeal. Indeed, the showing Petitioner made went to establish ugly threats of bodily harm to himself, his wife, his home and his pets, all under the collective weaponry of a dozen D.E.A. agents, in addition to being physically thrown to the floor of his living room while handcuffed.

The only reference in the whole record to the agents' mentioning a search warrant, coupled with defendant's acquiescence shortly thereafter, came *after* the threats described above and *after* agents removed Petitioner from the presence of his wife to "talk" to him. And *then*, the only testimony was that Petitioner cried out, "No, don't tear my house up."

The spectacle of drug agents segregating Petitioner from his wife—physically taking him to another room of his home—to interrogate him, followed by a cry of concern in obvious response to a threat to tear his house apart, conjures up admittedly dramatic comparisons with Gestapo or KGB inquisitions, or worse. The Fifth Circuit seemed to take solace in the fact that Petitioner never admitted that the agents made a "direct threat of bodily harm," slip opinion, p. 3681, as if such an occurrence was the only way to prove coercion.

In *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041 (1973) this Court said that "no matter how subtly the coercion was applied," its use in any form—"explicit or implicit"—vitiates the confession or consent obtained thereby. *Id.*, 412 U.S., at 728; 93 S.Ct., at 2048. Can it be that threatening to destroy a man's pets or to wreck his home is all right so long as the agents do not threaten to break the man's ribs or some designated portion of his anatomy?

The decision sought to be reviewed narrows the standard by which this Court has always measured voluntariness: "*** [I]f under all the circumstances it has appeared that the consent was not given voluntarily—that it was coerced by threats or force, or granted only in submission to a claim of lawful authority—then we have found the consent invalid and the search unreasonable." *Id.*, 412 U.S., at 234; 93 S.Ct., at 2051. Amazingly, the Government did not call any of the multitude of agents in attendance at the hearing held below to rebut the shocking scenario of what went on in Petitioner's home.[2]

This record reeked of uncontradicted evidence of both physical and psychological intimidation. Acquiescence which is resignation is not that consent which constitutes a free and intelligent waiver of a fundamental right.

[2]Though it occurred after defendant told the agents where the cocaine was, the following is representative of the conscienceless conduct of the DEA agents in this case: While Petitioner and his wife were being transported to jail, the agents gruesomely described how lesbians would attack and rape her in the local jail. Again, neither of the transporting agents was called to respond to Petitioner's charge.

II.

THE FIFTH CIRCUIT'S DECISION RESPECTING (1) WHAT CONSTITUTES A SHOWING OF EXIGENT CIRCUMSTANCES SUFFICIENT TO DISPENSE WITH THE REQUIREMENT OF A SEARCH WARRANT AND (2) WHAT CONSTITUTES A SHOWING OF COERCION SUFFICIENT TO ESTABLISH THE INVOLUNTARINESS OF A CONFESSION CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEAL ON THE SAME SUBJECTS.

(1) Inadequate showing of "exigent circumstances."

In *United States v. Roselli*, 506 F.2d 627 (7th Cir. 1974), then Judge Stevens wrote an opinion quite at odds with the opinion in the instant case. The decision bears both upon the absence of an objective basis for finding "exigent circumstances" in this record and upon the agents having virtually caused the "exigencies" which they later tried to hide behind. Briefly, the police believed that there was a large cache of marijuana in Roselli's apartment. When they knocked on the door and announced their presence, they then heard someone engaging the front door chain lock and a voice call out, "Don't open the door for anybody," followed by footsteps running from the door to the rear of the apartment. *Id.*, at 628. Fearing destruction of the contraband, the police entered without warrant.

Judge Stevens refused to confine his analysis solely to the reasonableness of the officers' conduct after the knock on the door:

> "*** [W]hen the emergency justification is advanced, we believe it is appropriate to appraise the agents' conduct during the entire period after they had a right to obtain a warrant and not merely from the moment when they knocked . . . ." *Id.*, at 630.

He noted also, as Petitioner has been urging, that "[i]n this case, the evidence does not adequately explain why no attempt to obtain a warrant was made, ***" *Ibid.* Furthermore, while the Seventh Circuit did not accuse the police of contriving the emergency, the Court observed that "certainly the emergency which did ensue was forseeable." "Moreover," Judge Stevens wrote, "this type of conduct may reoccur repeatedly and might lend itself to too easy a by-pass of the constitutional requirement that probable cause should generally be assessed by a . . . magistrate . . . ." *Ibid.*

The point is that the Fifth Circuit refused to integrate the period prior to the El Toro meeting with the events that later occurred in evaluating the reasonableness of the agents' failure to seek to secure a warrant. Additionally, no consideration was given to the fact that the agents easily could have waited until Petitioner and Gunn drove down the street before arresting them. In other words, the emergency the Government now points to was "certainly forseeable" and certainly created by its own imprudent action.

Perhaps the issue here has to do with one's view of just how fundamental the warrant requirement is. Interestingly, the last sentence of Judge Stevens' opinion strikingly parallels Justice Jackson's concurring opinion in *McDonald v. United States*, supra. Both expressed greater concern for

the privacy of a person's home than for society's interest in upholding the seizure of contraband. Justice Jackson said:

> "*** While the enterprise of parting fools from their money by the 'numbers lottery' is one that ought to be suppressed, I do not think its suppression is more important to society than the security of the people against unreasonable searches and seizures. When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some *real* immediate and serious consequences if he postponed action to get a warrant." 335 U.S., at 460; 69 S.Ct., at 195.

Judge Stevens wrote:

> "*** But when the emergency involves no grave danger to the lives of the officers or others,[11] and when the event the officers were seeking to prevent would itself remove the contraband from circulation, society's interest in upholding the seizure weighs less heavily against the individual's interest in privacy than it might in other pressing circumstances." 506 F.2d, at 631.

The question is where do the Court's priorities lie: with the Seventh Circuit's decision in *United States v. Roselli*, supra, or the Fifth Circuit's decision in the case *sub judice*. Because, clearly, there were not present in the case at bar even those minimal objective facts (lock engaging, shouting, footsteps) found inadequate in *Roselli* to justify dispensing with the warrant requirement.

---

[11] footnote omitted

(2) "Coercion" is different in the Ninth and Sixth Circuits than it is in the Fifth Circuit.

United States v. Calhoun, 542 F.2d 1094 (9 Cir. 1976) applied the precepts of *Schneckloth v. Bustamonte, supra*, in the broad sense obviously intended by this Court. Wimbley, a co-defendant of Calhoun, was arrested in his apartment. The agents asked for permission to search, "telling Wimbley that either his permission or a search warrant would be required." *Id.*, at 1101. But, as in the case at bar, there were additional factors present which caused the Court to invalidate his consent:

> "Appellant was under arrest and handcuffed and the request to search came during the middle of the night. Before the arrest, Wimbley had faced drawn guns of several officers. His wife was handcuffed in an adjoining room and . . . the atmosphere in the apartment was tense.[1] ***
>
> Viewing the 'totality of the circumstances' that surrounded the search request and Wimbley's response, we conclude that the district court's determination that Wimbley voluntarily consented was clearly erroneous . . . ." *Id.*, at 1101-1102.

In *United States v. Brown*, 557 F.2d 541 (6th Cir. 1977), the Court opined that "[a]ppellate courts have a duty to examine the entire record and make an *independent determination* on the voluntariness of a confession." *Id.*, 545-546. Agreeing with Justice Frankfurter's approach in *Culombe v. Connecticut*, 367 U.S. 568, 81 S.Ct. 1860

[1]footnote omitted

(1961) the Court broke its analysis down into three parts, only one of which was concerned with whether the trial court's decision was clearly erroneous.

Even though the Court agreed with the District Court's findings with respect to whether the defendant was beaten (which it found he was not), the Court decided that:

> "*** On review of the record, we are inescapably led to the conclusion that the confession was not voluntary, in the sense that it was not the product of a free and rational choice, but was induced by Appellant's overwhelming fear that he would be beaten by the police. ***" *Id.*, at 548.

Compare the above decisions with Petitioner's undisputed testimony:

> "*** They threatened my dog, threw me on the floor. ***
>
> Q. Did you see guns drawn on your wife Susan?
>
> A. Yes, there were. There were guns drawn on her and myself.
>
> Q. What was your state of mind then?
>
> A. Still fear. Didn't know what they were going to do. *They threw me on the floor.* I was pretty scared. I didn't know what was going to happen. *I didn't know if I was going to be beat up, shot or what.*
>
> * * *

I felt bodily harm for all of us.

Q. And there were guns drawn in your house, were there not?

A. There were, sir.

* * *

They told me if I didn't tell them where it was, that they would destroy the house and they would find it. ***

* * *

Q. Tell us your state of mind, then, your reasons for your acquiescing to their demands at that time.

A. I felt that after the threatening of my dogs, the gun to my old lady, that there was going to be bodily harm. I was pushed to the floor. I was afraid that both of us were going to get hurt physically. I was already in a state of mental shock. *I told him where it was at simply to save myself and my wife from any physically more harm than had already come to us.*" (TR. 71-72, 73, 76-77)

The Fifth Circuit's decision in the instant case does not accord with the analysis or standards applied in the Ninth and Sixth Circuits. In the Fifth Circuit the controlling concern is basically whether a defendant received a "direct threat of bodily harm."

III.

THE FIFTH CIRCUIT'S DECISION ON THE BURDEN OF PROOF AND EXTENT OF PROOF NECESSARY TO BE BORNE BY A DEFENDANT RESPECTING AGENTS' DISREGARD OF 18 U.S.C. §3109's REQUIREMENT OF ANNOUNCEMENT OF "PURPOSE AND AUTHORITY" IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT.

There are myriad decisions of this Court deciding that in warrantless search cases the Government has the burden of proving one of the exceptions to the warrant requirement. But this Court has never addressed the question of whether the burden of proving official compliance with 18 U.S.C. §3109 is subsumed within the government's burden of proving one or more of the exceptions. Petitioner urges that when, as in the case at bar, the Government assumes the burden of proving that its entry into Petitioner's home was legal (because both sides stipulated to the absence of a warrant at the outset of the suppression hearing), the Government bears the burden of proving that all aspects of the entry were legal.

The decision below dissects the entry process and limits the Government's burden of proof to showing merely constitutional regularity and not statutory regularity. In *United States v. Jeffers*, 342 U.S. 48, 72 S.Ct. 93 (1951), though not entirely in point with this issue, the Court decided that the events leading to the determination of the legality of an entry, search and seizure are "not . . . easily isolable." 342 U.S., at 52; 72 S.Ct., at 95, 96. "Rather," the

Court said, "they are bound together by one sole purpose—to locate and seize the narcotics of the respondent. ***" *Ibid.* In other words, if the sole aim of the agents is to get inside a person's home to seize drugs, everything they do must be done legally. The burden the Government assumes in the absence of a warrant is an all-inclusive burden.

Assuming *arguendo,* however, that the decision below is correct, and that the Government need only prove that its entry complied with constitutional requirements, has a defendant *not* discharged his burden of proving statutory non-compliance where, during cross-examination of a Government agent, he elicits that, indeed, §3109 was not heeded by the agents before entry? To hold that because the defendant, himself, did not take the stand and repeat what the agent had already admitted, to wit: that the agent who knocked neither announced authority nor purpose, gives *less* than "grudging application" to §3109. *Miller v. United States,* 357 U.S. 301, 314, 78 S.Ct. 1190, 1198 (1958):

> "*** The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application. Congress, codifying a tradition embedded in Anglo-American law, has declared in §3109 the reverence of the law for the individual's right of privacy in his house. ***" *Ibid.*

The decision below permits "a quibbling distinction to overturn a principle which was designed to protect a fundamental right." *United States v. Jeffers,* supra, 342 U.S., at 52; 72 S.Ct., at 95-96.

CONCLUSION

For the above and foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

GEORGE D. GOLD, ESQ. and
MORAN & GOLD, P.A.
950 South Miami Avenue
Miami, Florida 33130
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the within Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been mailed to the Solicitor General, United States Department of Justice, Washington, D.C. 20530, this _____ day of September, 1977.

GEORGE D. GOLD

Appendix A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Joseph Michael GARDNER,
Defendant-Appellant.

No.76-2291.

United States Court of Appeals,
Fifth Circuit.

June 10, 1977.

Defendant was convicted before the United States District Court for the Southern District of Florida, at Fort Lauderdale, Norman C. Roettger, J., of possession of both cocaine and marijuana with intent to distribute, and he appealed. The Court of Appeals, Roney, Circuit Judge, held that: (1) warrantless intrusion into defendant's home was lawful under exigent circumstances exception to warrant requirement and (2) defendant failed to sufficiently prove violation of statutory knock and announce requirements to obtain suppression of evidence seized after warrantless entry.

Affirmed.

1. Drugs and Narcotics — 185

Where, although Drug Enforcement Administration knew in advance that defendant and his wife were involved in the drug trade, agents only anticipated that supply of drugs would be at defendant's home, at least some of

cocaine was thought to be stored in an automobile, and premature raid would "tip the hand" of agents, Drug Enforcement Administration was justified in not seeking search warrant before informer, who had named defendant's wife, as his source, arrived in town.

2. Searches and Seizures — 3.2

Reasonableness of search under exigent circumstances exception to warrant requirement is not foreclosed by failure to obtain warrant at earliest practicable moment.

3. Drugs and Narcotics — 185

When informer, whose signal that cocaine was in house provided ample probable cause for arrest of defendant, told agents that someone was in house, immediate entry became necessary to prevent disposal of cocaine, a powder that can easily be flushed down a toilet, and thus warrantless entry by agents, who could logically have suspected that anyone inside house would be well aware of five police cars ringing premises and arrest of defendant and who knew that person in house might be defendant's wife and partner in drug trade, was justified to preserve evidence and was lawful under exigent circumstances exception to warrant requirement. U.S.C.A.Const. Amend. 4.

4. Drugs and Narcotics — 185

Where, although evidence was conflicting, agent testified that he read Miranda warnings to defendant, threat to obtain warrant which would facilitate thorough and perhaps disruptive search of premises was merely threat to exercise rights granted agents by law, and record did not show that threat, which was made after lawful warrantless intrusion to preserve evidence, was misleading or made groundlessly in bad faith, subsequent search by agents, whose threat to obtain warrant did not demonstrate either Fourth or Fifth Amendment violation, based on statement by defendant, who indicated that he wanted to avoid search, as to where cocaine was located was not invalid. U.S.C.A.Const. Amends. 4, 5.

5. Searches and Seizures — 3.3

Statute which provides that officer may break into house to execute search warrant if, after notice of his authority and purpose, he is refused admittance applies whether or not officer acted pursuant to warrant. 18 U.S.C.A. § 3109.

6. Searches and Seizures — 3.8(1)

In asserting claim under statute providing that officer may break into house to execute search warrant if, after notice of his authority and purpose, he is refused admittance, burden of establishing prima facie case rests on defendant and, because of presumption of government propriety, defendant should at least put into evidence some testimony which establishes factual basis for claim that statute has been violated. 18 U.S.C.A. § 3109.

7. Searches and Seizures — 3.8(1)

Where neither arresting officer, defendant nor defendant's neighbor, all of whom were present at scene, testified that agent who unlocked door to defendant's house failed to give required announcement, and positive testimony showed that agent knocked, defendant failed to meet his burden of showing violation of knock and an-

nounce requirements of statute which provides that officer may break into house to execute search warrant if, after notice of his authority and purpose, he is refused admittance. 18 U.S.C.A. § 3109.

Appeal from the United States District Court for the Southern District of Florida.

Before WISDOM, CLARK and RONEY, Circuit Judges.

RONEY, Circuit Judge:

In this proceeding the defendant appeals his two count conviction for possession of both cocaine and marijuana with intent to distribute. 21 U.S.C.A. § 841 (a) (1). His sole contention: the trial court erred in denying his motion to suppress evidence seized after a warrantless entry into his home. Finding the intrusion lawful under the exigent circumstances exception to the warrant requirement, and that defendant failed to prove sufficiently a violation of the knock and announce requirements of § 3109 to obtain suppression of the evidence, we affirm.

In May 1975, Drug Enforcement Administration (DEA) officials arrested Ronald Gunn in Georgia after Gunn sold them cocaine. Gunn named defendant's wife, Susan Gardner, as his source. In hope of lenient treatment, Gunn agreed to cooperate with DEA by working as an informer.

After a monitored phone call to the Gardner household, Gunn flew to the Fort Lauderdale airport and met defendant in a local bar. The two men then traveled to defendant's home. DEA agents, who had been following

Gunn, tailed the pair as they left the bar, but lost them in traffic. Other agents, however, had staked out defendant's home because they thought a kilogram of cocaine might be hidden there. As a result, they were on the scene when defendant and the informer arrived. After 15-20 minutes, the two emerged from the home. The informer pulled out his shirttail and wiped his glasses, a prearranged signal that cocaine was in the house. Federal agents, in at least five cars, promptly moved in with their guns drawn and arrested both defendant and Gunn.

Gunn told the agents a female was in the house. The agents took the defendant's car keys, knocked on the door, unlocked it, and entered. Inside they found the defendant's wife. The evidence concerning the conduct of the officers upon gaining access to the house conflicts. Both parties agree, however, that the defendant, upon being told a warrant could be obtained to allow a thorough search, correctly informed the agents that cocaine could be found in a kitchen cabinet.

The defendant claims the entry violated his Fourth Amendment rights so that the fruits should be excluded from evidence. He argues that the Government has not met its burden of showing probable cause and "exigent circumstances" to justify the entry into his house without a warrant. See Coolidge v. New Hampshire, 403 U.S. 443, 455, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); Walker v. United States, 225 F.2d 447 (5th Cir. 1955). The argument has two prongs: first, there was no proof of an inadequate opportunity to obtain a search warrant; and second, there was insufficient proof of imminent destruction of contraband.

[1, 2] Defendants argue that probable cause for a search warrant existed so far in advance of the search that

the agents' failure to obtain a warrant was inexcusable. McDonald v. United States, 335 U.S. 451, 454-455, 69 S.Ct. 191, 93 L.Ed. 153 (1948). Certainly the DEA knew in advance that the Gardners were involved in the drug trade. In the language of the trial judge, however, the agents only "anticipated" that a supply of drugs would be in the house. The defendant testified no cocaine was in the house when he received the monitored phone call the defendant now says should have established probable cause. The DEA attempted to tail Gunn and the defendant from the airport, presumably because they were uncertain where the illicit transaction would take place. At least some of the Gardners' cocaine was thought to be stored in a "yellow Jaguar." Because of those uncertainties, as well as the danger that a premature raid would "tip the hand" of the agents and the need to enforce high standards of probable cause to protect the homes of citizens from unreasonable intrusions, the DEA was justified in not seeking a warrant before Gunn arrived in town. In any event, the reasonableness of a search under exigent circumstances is not foreclosed by the failure to obtain a warrant at the earliest practicable moment. Cardwell v. Lewis, 417 U.S. 583, 595-596, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974); United States v. Mitchell, 538 F.2d 1230, 1233 (5th Cir. 1976) (en banc).

[3] Defendant contends there was insufficient proof of imminent destruction of contraband to satisfy the exigent circumstances exception to the warrant requirement. The district court's finding of adequate justification for entry is not clearly erroneous. Gunn's signal provided ample probable cause for arrest. When Gunn told the agents someone was in the house, an immediate entry became necessary to prevent disposal of the cocaine, a powder which can easily be flushed down a toilet. The agents could

logically have suspected that anyone inside the house would be well aware of the five police cars ringing the premises and the arrest of defendant and Gunn. The danger that someone would dispose of the illicit drugs was especially great in this case because the agents knew the person in the house might be Susan Gardner, the defendant's wife and partner in the drug trade. Accordingly, the agents justifiably acted " 'now or never' to perserve the evidence of the crime." Roaden v. Kentucky, 413 U.S. 496, 505, 93 S.Ct. 2796, 2802, 37 L.Ed.2d 757 (1973).

Defendant argues that only if the agents knew that his wife was in the house could they rely on the imminent danger of contraband destruction as an exigent circumstance to justify a warrantless entry. Such sure knowledge that the person in the house was Susan Gardner was not a necessary prerequisite to entry. The agents could rely on the reasonable forecast that anyone in the house at the time defendant and Gunn were there might know cocaine was present and, seeing the major arrest activity in front of the house immediately upon their departure, might be expected to try to dispose of it.

The defendant's reliance on Vale v. Louisiana, 399 U.S. 30, 34, 90 S.Ct. 1969, 26 L.Ed.2d 409 (1970), to foreclose a finding of exigent circumstances is misplaced. In Vale, the Court held that police ignorance as to whether anyone was inside a house known to contain drugs deprived the situation of the emergency character necessary to justify a warrantless search. In this case, however, the officers did know someone was on the premises, and they could logically have concluded disposal of the contraband was imminent. As a result, the facts of Vale are distinguishable, and its holding does not control this decision.

[4] The defendant further contends that once the agents entered and secured the premises, thereby assuring that any concealed evidence would not be destroyed, they were required to seek a search warrant for the premises before they could go back through the house and search for contraband. United States v. Erwin, 507 F.2d 937, 938 (5th Cir. 1975); see also United States v. Looney, 481 F.2d 31 (5th Cir.), cert. denied, 414 U.S. 1070, 94 S.Ct. 581, 38 L.Ed.2d 476 (1973). Upon the threat that a search warrant could be obtained, however, the defendant told the agents where to find the cocaine, indicating that he wanted to avoid a search. Defendant asserts that he was coerced, so the subsequent search was invalid. Schneckloth v. Bustamonte, 412 U.S. 218, 222, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Although the evidence was conflicting, an agent testified he read Miranda warnings to defendant and the court so found. The threat to obtain a warrant which would facilitate a thorough and perhaps disruptive search of the premises was merely a threat by the officers to exercise rights granted them by the law. The record does not show the threat was misleading or made groundlessly in bad faith. See Bivens v. Six Unknown Named Agents, 456 F.2d 1339 (2d Cir. 1972). The defendant conceded he could not recall a "direct threat to my bodily person." The trial judge concluded the defendant was not under duress, and his finding is not clearly erroneous. The record does not show either a Fourth or Fifth Amendment violation.

[5] The defendant also seeks to exclude the same evidence by asserting that the federal agents, by failing to announce their "authority and purpose" before they unlocked the door of defendant's home, violated 18 U.S.C.A. § 3109. That statute provides: "[t]he officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search

warrant, if, after notice of his authority and purpose, he is refused admittance . . . ." The statute applies whether or not the officers acted pursuant to a warrant. Sabbath v. United States, 391 U.S. 585, 588, 88 S.Ct. 1755, 20 L.Ed.2d 828 (1968).

We need not decide the effect of a violation on defendant's case. The defendant's being outside with the officers rather than in the building at the time of entry is not relevant to this decision. The record does not show a § 3109 violation. DEA Agent James C. Brown, the arresting officer, when asked what the agent who had unlocked the door had said, replied "I don't know that he said anything at all." Neither Agent Brown, nor the defendant, nor the defendant's neighbor, all of whom were present at the scene, testified that the agent failed to give the required announcement. Positive testimony showed that he knocked.

[6, 7] In asserting a § 3109 claim, the burden of establishing a prima facie case rests on the defendant. United States v. Murrie, 534 F.2d 695, 698 (6th Cir. 1976). Because of the presumption of Government propriety, the defendant should at least put into evidence some testimony which establishes the factual basis for a claim that § 3109 has been violated. See Rogers v. United States, 330 F.2d 535 (5th Cir.), cert. denied, 379 U.S. 916, 85 S.Ct. 265, 13 L.Ed.2d 186 (1964). The burden is not great, and parallels the necessity that a defendant assert a search was conducted without a warrant before the Government is forced to prove the search was reasonable within the confines of the Fourth Amendment. In this case, the defendant has failed to meet that burden, and his claim to relief under § 3109 must fail.

AFFIRMED.

Appendix B

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

TEL 504—589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

August 16, 1977

TO ALL PARTIES LISTED BELOW:

NO. 76-2291 - U.S.A. v. JOSEPH MICHAEL GARDNER

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing**and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk

By Brenda M. Hauck
Deputy Clerk

** on behalf of appellant, Joseph Michael Gardner,

cc: Mr. Peter F.K. Baraban
Mr. George D. Gold
Mr. C. Wesley G. Currier

Appendix C

IN THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-2291

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOSEPH MICHAEL GARDNER,
Defendant-Appellant.

Appeal from the United States
District Court for the
Southern District of Florida

ORDER:

( ) The motion of APPELLANT for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

(✓) The motion of APPELLANT for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including September 15, 1977, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court

denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion for a further stay of the issuance of the mandate is DENIED.

/s/ Paul H. Roney
UNITED STATES CIRCUIT JUDGE